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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re L. O.-L., a Person Coming
Under the Juvenile Court Law.

B290203
(Los Angeles County
Super. Ct. No.
18CCJP01099A)

LOS ANGELES COUNTY
DEPARTMENT OF
CHILDREN AND FAMILY
SERVICES,

Plaintiff and Respondent,

v.

SARA L.,

Defendant and Respondent.

APPEAL from an order of the Superior Court of Los Angeles County, Steff R. Padilla, Referee. Reversed.

Law Offices of Marissa Coffey and Marissa Coffey, under appointment by the Court of Appeal, for Appellant L. O-L.

Mary C. Wickham, County Counsel, Kristine P. Miles,
Acting Assistant County Counsel, Kim Nemoy, Principal Deputy
County Counsel, for Plaintiff and Respondent Los Angeles
County Department of Children and Family Services.
No appearance for Defendant and Respondent.

I. INTRODUCTION

In February 2018, the Los Angeles County Department of Children and Family Services (Department) filed a Welfare and Institutions Code¹ section 300 petition alleging that 16-year-old L. O.-L. (the child) and her sister (the younger sister), came within the jurisdiction of the juvenile court because their mother's male companion Diego A. sexually abused the child for a period of approximately four years, beginning when the child was 11 years old. Finding that the child had been sexually abused, but that a preponderance of the evidence did not establish that Diego was the abuser, the juvenile court dismissed the petition. The child appeals and we reverse.²

II. BACKGROUND

In about 1997, at age 14, mother became pregnant with son David (apparently father's son). In 1999, A.T., the child's older

¹ All statutory citations are to the Welfare and Institutions Code.

² The younger sister did not appeal from the juvenile court's dismissal order and is not a subject of this appeal.

sister, was born. Mother and father married in 2000. The child was born in 2001. Mother and father separated in early 2003. Mother and Diego began their relationship in 2004. The younger sister—mother and Diego’s daughter—was born in 2008. Mother and father divorced in 2016. Mother and Diego’s son Timothy was born in early 2018.³

A. *The Detention Report and Hearing*

In January 2018, the Department received a referral that the child stated she was being molested by Diego who lived in her home. The child had not told mother about the abuse because mother was pregnant.

On January 22, 2018, a social worker and two police officers went to the family’s home where the social worker interviewed the family members. The child told the social worker that Diego sexually abused her from the age of 11 to the age of 14. She did not remember how many times Diego molested her, but it happened “a lot.”

The child said that she and the older sister slept on a bunk bed in mother and Diego’s bedroom. At night, when mother was sleeping, Diego would climb up the bunk bed and lie next to the child. Diego fondled the child’s vagina over and under her clothes. The child denied “any penetration,” stating that she was a virgin. When Diego molested her, the child froze, not knowing what to do. She did not remember touching any of Diego’s body parts. The child had not witnessed Diego sexually abuse any of her siblings.

³ Apparently, a section 300 petition was filed with respect to Timothy. Timothy is not a subject of this appeal.

Mother was a heavy sleeper and never noticed Diego climbing on top of the bed. The child did not tell mother about the molestation because she was afraid of Diego. She told mother about the molestation a few days prior.

The child felt safe at home, at school, and during her weekly weekend visits with father, but felt uncomfortable living in the same home with Diego now that she understood what had happened. The child had a hard time sleeping at night because she constantly remembered what had happened to her.

Mother, who was seven and a half months pregnant with Diego's child, told the social worker that the child informed her of Diego's sexual abuse a few days prior. Mother was shocked because she never expected such conduct from Diego and there were no clues about sexual abuse. Mother said the child had always appeared comfortable in Diego's presence, asking him for a towel or shampoo when she was in the shower.

Mother believed the child, but did not know what to do. She knew she had to address the issue with Diego, but did not know how. She was willing to comply with Department orders and keep Diego away from the girls. Mother obtained an emergency protective order.

Mother stated that a couple of years prior, Diego found images of pornography on the child's phone and took the phone away from her. The child told father that Diego had taken her phone, upsetting father. Father told mother that "they" had no right to take the child's phone, that he had purchased it for her.

The older sister told the social worker she had not seen Diego do anything inappropriate to the child or the younger sister, but that she believed the child. She denied sexual abuse

by Diego and felt safe in the home, but stated that Diego recently brushed his hand from her shoulder to her breast.

The younger sister told the social worker that she felt safe at home. She denied sexual abuse.

Diego denied to the social worker that he had sexually abused the child and stated that he had never touched her. He said that the child recently had returned from paternal grandparents' house and said her foot hurt. The child asked Diego to massage her foot, so he rubbed her foot to make it feel better. When the child was 13 years old, he found pornography on her phone and took the phone away.

After the social worker completed the interviews, the detective who was present decided that Diego had to leave the home. The child refused to remain with mother and resided with father.

On February 1, 2018, the child participated in a forensic exam during which she disclosed Diego's chronic sexual abuse between the ages of 11 and 15. She stated that Diego had climbed on top of the bunk bed where she was asleep and "rubbed her vaginal area, describing it 'inside my part[]' 'my clit area.'" Diego also groped her breasts, putting his hand inside of and outside of her clothes. Once, Diego grabbed the child's hand and put it on top of his erect penis over his clothes. The child had blocked the memories of Diego's sexual abuse until recently when he entered the bathroom while she was showering. The child was depressed and fearful that mother would not understand or support her.

On February 6, 2018, the social worker interviewed maternal grandfather Victor L. He had observed Diego going into the shower while the child and the younger sister were showering

separately. Victor did not know what Diego did when he entered the bathroom.

The same day, the social worker interviewed father. Father said that the child had been a happy child until the age of 11, when she became less happy. Father believed the child's report of sexual abuse. She was not the type of child who would lie about something like that. After her February 2, 2018, "CATS exam," the child told father she did not want to go home with mother and wanted to stay with him. The child had resided with father thereafter.

Father reported that over the prior two years, the child had asked mother to enroll her in counseling, but mother had not done so. The older sister told father that the child had expressed suicidal thoughts, telling the older sister that she wanted to jump in front of a bus. The child felt betrayed by mother because mother continued to have a relationship with Diego.

On February 7, 2018, the social worker interviewed mother's sister Lydia who lived with mother and her family. Lydia reported that a few weeks prior, the child told her about an incident when Diego walked into the bathroom while she was showering and handed her conditioner. The child told Diego she did not need conditioner and asked him to leave the bathroom. Diego complied. The child also told her that Diego had fondled her over and under her clothes from the age of 11 to the age of 14. Lydia was present when the child told mother about Diego's sexual abuse, and mother appeared shocked.

On February 20, 2018, the Department filed a section 300 petition on behalf of the child and the younger sister alleging counts as to the child and the younger sister under section 300, subdivisions (b) (failure to protect) and (d) (sexual abuse) and as

to the younger sister under subdivision (j) (abuse of sibling). The petition was based on the allegations that Diego sexually abused the child by repeatedly fondling and digitally penetrating her vagina, fondling her breasts, and grabbing her hand and having her touch his erect penis. It further alleged that Diego had entered the bathroom while the child was showering. Mother knew or reasonably should have known that Diego was sexually abusing the child and failed to protect her. Diego's sexual abuse of the child and mother's failure to protect the child endangered the child and the younger sister.

At the February 21, 2018, detention hearing, the juvenile court found a prima facie case for detaining the child and that the child was a person described by section 300. It detained the child from mother's care and released her to father. The juvenile court also detained the younger sister from Diego's care and placed her with mother.

B. *The Jurisdiction/Disposition Report and Hearing*

On March 6, 2018, a social worker spoke with the child. The child was happy living with father and felt he protected her and kept her safe. The child did not want to return to mother's care because she felt that mother did not believe her about the sexual abuse.

Consistent with her prior interview, the child recounted Diego's sexual abuse. She stated he molested her about once or twice a week. She again reported that Diego would enter the bathroom when she was taking a shower and state he was going to use the bathroom. Mother knew that Diego would enter the

bathroom while the child was showering and would tell the child that he was bringing her towels.

The child disclosed the sexual abuse to mother because she had started to feel depressed and suicidal. Mother did not believe the child and said, “Look at all this mess you made.” Mother also said she would tell Diego to “calm down” and that if he did not stop, she would report it.

The younger sister told the social worker that she did not believe the child. She said that Diego had never done anything “bad” to the child or the older sister. The younger sister believed the child claimed that Diego touched her so she could live with father.

Mother told the social worker that she was trying to “find clues” and did not know when Diego could have sexually abused the child. They all slept in the same room, the child on the top bunk bed and mother and Diego on the floor. If Diego got up at night, mother always woke up. She never suspected “anything like this was happening.”

The child told mother about Diego’s abuse on a Friday. Mother’s baby shower was the following Sunday. Mother did not confront Diego about the abuse prior to the baby shower at the child’s request so as not to ruin the baby shower. During the baby shower, mother saw the child hugging Diego and eating with him, which confused mother.

When mother confronted Diego, he denied the allegations. Mother did not know what to believe as the child might be telling the truth or lying.

As for Diego entering the bathroom when the child showered, mother stated that there was one bathroom in the apartment and everyone walked in when others were showering.

There was a shower curtain, and everyone knocked on the door before entering.

When asked if she planned on reuniting with Diego, mother said she did not know what to do stating, “She [the child] doesn’t want to be here, so I am going to be without her and without him?” Mother stated that she did not disbelieve the child, but did not know when the molestation happened. She suggested that the child might be lying so she could live with father.

The older sister told the social worker that she believed the child, stating that the child would never lie about something so serious. The older sister had never witnessed Diego do anything to the child. Diego had brushed up against the older sister’s breasts and acted as if it was accidental. The older sister stated that it was hurtful that mother did not believe the child.

On March 8, 2018, the social worker interviewed Diego. Diego told the social worker he was surprised and shocked by the child’s allegations. He thought that the child wanted more freedom because she had a boyfriend, which mother and he would not permit. Diego suggested the child was lying so she could live with father, who gave her more freedom. He also thought the child might still be upset about him taking her phone away when she was 13 years old.

At the jurisdiction hearing, the child testified that Diego started touching her when she was about 11 years old and he stopped when she was 14 years old. The child slept on the top bunk, the older sister and the younger sister slept on the bottom bunk, and mother and Diego slept on the floor.

Sometimes the child woke up during the night. If Diego was awake, she would ask him for water. After giving her some water, Diego would ask if she wanted him to “put [her] to sleep.”

The child understood that to mean that Diego would lie down next to her and he would hug her until she fell asleep as he had done with the older sister. At first, the child allowed Diego to put her to sleep, but it made her feel “a little bit uncomfortable.” Diego did not then molest her. When the child asked Diego not to put her to sleep, he sometimes still climbed into her bed.

When the child was about 11 or 12 years old, Diego began his sexual abuse by climbing into her bunk bed, lying next to her, and grabbing her breast. Diego touched the child both over and under her clothes. Diego also slid his hand down the child’s pants and inside her underwear. The sexual abuse occurred about twice a week.

Diego also invaded the child’s privacy. When she was in the shower, he would knock on the door and say he needed to use the bathroom. At first, when Diego entered the bathroom, there was no shower curtain separating the child from him and she turned her back towards him. The child was confused and uncomfortable.

When the child was 16 years old, Diego entered the bathroom while she was showering. He said he needed to use the bathroom. After using the bathroom, Diego left. Moments later, he returned and asked the child if she wanted some conditioner. She declined and Diego said, “No. Here. Just take the conditioner.” He then pulled the curtain away and offered the child the conditioner.

The child reported Diego’s sexual abuse to Lydia in January 2018. Lydia encouraged the child to tell mother about the abuse. When the child told mother about the abuse, mother asked why she had not told her sooner. Two days later, after mother’s baby shower, mother asked the child how she felt about

mother telling Diego to stop or she would report him to the police. Before the child could answer, her conversation with mother was interrupted.

The child did not want to return to mother's house because she felt mother betrayed her. When the child told mother about Diego's sexual abuse, mother told her that she believed her and that things would get better. Then, mother started acting angry with the child.

The child was aware that Diego had gall bladder surgery and that he informed the family his doctor told him he would need frequent access to the bathroom to avoid infection. The child's showers sometimes lasted 15 to 20 minutes.

There were strict rules when the child's family lived in Diego's mother's house. The child was not allowed to have a boyfriend, but she had a boyfriend at the time she disclosed Diego's sexual abuse to mother. Mother knew about the child's boyfriend but never said anything about it.

The child had not had a close relationship with father. She did not visit him in his home. The child spent weekends in paternal grandmother's home and would see father there if he came over to pick up mail or for family parties. The child was "okay" with that arrangement.

The child found living with father "a little bit hard because [she had] to get used to the situation, but it's better." Father was about as strict as mother, but was stricter about grades.

The child denied that mother or Diego ever found inappropriate content on her phone or that mother or Diego took her phone away from her.

The older sister testified that she and the child shared a bed when they were young. The older sister did not remember

Diego “going up to [their] bed” during that time. The metal bunk beds squeaked loudly when someone climbed up to the top bunk.

After they stopped sharing a bed, the older sister did not recall waking and seeing Diego in bed with the child. Diego had put the older sister to sleep when she was younger by telling her stories. He was “on the side” and not in the bed. Diego never entered the bathroom when the older sister was in the bathroom. The older sister testified that Diego never did anything to her that made her feel uncomfortable, but also testified that he once brushed up against her breast which made her feel uncomfortable. The older sister never saw anything that caused her to feel uncomfortable around Diego. The child never told her that Diego did anything that made her feel uncomfortable.

Depending on the situation, mother was strict. The older sister was not permitted to have a boyfriend or stay out very late at night. The child never complained that mother was stricter than father. The older sister did not remember an incident when the child’s phone was confiscated when the child was 13 years old.

The child sometimes told the older sister that she was angry because she was not able to see father. The child also said that father preferred “the other kids”—apparently father’s other children—over her.

Asked if she believed the child, the older sister responded, “I don’t know. But I do believe that something did happen to her. I mean I don’t know who but kind of.” The older sister believed the child was sexually abused because the child’s moods changed when the child was in sixth grade. She was happy one day and angry the next. The child never told the older sister that she had been the victim of any kind of sexual abuse by anyone.

Asked if she believed Diego sexually abused the child, the older sister responded, “I don’t know. I don’t want to say yes, but then I don’t want to say it’s no because I don’t know.”

Diego testified that he had lived with the child since she was four months old. Until this case, they had a positive relationship. Diego never got into bed with the child. He admitted that he once entered the bathroom when the child was in the shower, but stated that he had his gall bladder removed and “couldn’t hold it no more.” Diego asked the child if he could use the bathroom and she said “yes.” He did not recall entering the bathroom to give her conditioner.

Diego never touched the child inappropriately. The child’s allegation that that he sexually abused her from the age of 11 to the age of 15 was untrue. He guessed that the child made the allegations against him because she wanted to live with her grandmother or with father. There were rules in Diego’s house, the child was not permitted to have a boyfriend or go to parties. Diego took the child’s phone from her for three days when she was 13 years old after finding a pornographic video on it. Mother told father the child’s phone had been taken from her and to not give her a phone, but father gave the child a phone nevertheless. Diego did not contend that the child made up the allegations of sexual abuse because he took her phone.

At the conclusion of the jurisdiction hearing, the juvenile court stated:

“I’ve been thinking about this case a lot, and it’s a difficult case. It’s not as open and shut as any counsel would have you believe—have me believe. It’s just not.

“I’ll state for the record that [the child] was testifying. She was not just crying. She was shaking uncontrollably. It was

not—it's not a voluntary act, while she's testifying, her leg is shaking. One leg is shaking uncontrollably. So I have to look at the variety of different things.

“First of all, I'm going to indicate that her own sister thinks she was sexually abused. She changed her behavior, and it was not just a teenage behavior. . . .

“There is one thing that I—there is one piece of evidence that I find beyond a reasonable doubt. The grandmother, the mother, [the child], and others have testified that [Diego] would go in and out of the bathroom whoever was in the shower. He didn't care.

“That's crossing a boundary. That's absolutely crossing a boundary to just go in the bathroom. It does matter. Your 16-year-old stepdaughter is in there naked, and whether or not there's a shower curtain or not or a door or not, that's crossing a boundary. So I have to look at what the burden of proof is.

“And I have faced this before many times and preponderance of the evidence means something. I don't believe [Diego] did himself any good by testifying because sometimes you look at testimony—and I understand the wanting to present the best possible picture, but sometimes the truth would have been better because it causes me to wonder why aren't you telling the truth.

“If you want me to believe this child made up an allegation of sex abuse because you took her phone away from her three and a half years ago and because the father lets her have a boyfriend and the mother and how dare she, I don't believe you. That's not why she came into this courtroom because you took her cell phone away three years ago. I also don't believe that it didn't happen.

“This child was sexually abused. I will indicate that there’s no evidence to conclude that mother did anything inappropriate. The first time she had an opportunity to respond to it, [the older sister] wasn’t told, her mother wasn’t told, the grandparents weren’t told. Nobody was told. What’s a mother supposed to do?

“So, Ms. Sweet [mother’s counsel], I don’t think your client fell below the standard of care of any mother or any parent on any of the petitions.

“I believe this child was sexually abused but I cannot find by a preponderance of the evidence that it was [Diego.]

“All three petitions are dismissed.”

The juvenile court then added: “Even if I found this child to be sexually abused—and I believe her. She was sexually abused—I just don’t believe—there’s not enough evidence to show it was [Diego.] I will indicate that, even if I found that [Diego] had sexually abused his children—the stepdaughter, there’s nothing to show a risk to the younger two children. As a matter of law, I would have dismissed the other two children anyway.” It further added, “Don’t ever walk into a teenager’s bathroom. Just don’t.”

III. DISCUSSION

The Juvenile Court Erred in Dismissing the Section 300, Subdivision (d) Count

Under section 300, subdivision (d),⁴ a child is within the jurisdiction of the juvenile court if the child has been sexually

⁴ Subdivision (d) provides that a child is within the jurisdiction of the juvenile court if: “The child has been sexually

abused or there is a substantial risk the child will be sexually abused. The child contends that insufficient evidence supports the juvenile court's dismissal of the section 300 petition. We hold that the evidence compels a finding of jurisdiction under subdivision (d)⁵ as a matter of law and, accordingly, that the juvenile court erred in dismissing the subdivision (d) count.

“[W]here the issue on appeal turns on a failure of proof at trial, the question for a reviewing court becomes whether the evidence compels a finding in favor of the appellant as a matter of law. [Citations.] Specifically, the question becomes whether the appellant's evidence was (1) ‘uncontradicted and unimpeached’ and (2) ‘of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding.’ [Citation.]” (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1528; *In re Luis H.* (2017) 14 Cal.App.5th 1223, 1226-1227 [applying standard of review to a dependent's challenge to a juvenile court's no jurisdiction finding].)

abused, or there is a substantial risk that the child will be sexually abused, as defined in Section 11165.1 of the Penal Code, by his or her parent or guardian or a member of his or her household, or the parent or guardian has failed to adequately protect the child from sexual abuse when the parent or guardian knew or reasonably should have known that the child was in danger of sexual abuse.”

⁵ In light of our holding, we do not decide whether the juvenile court also erred in dismissing the subdivision (b) count. (*In re I.A.* (2011) 201 Cal.App.4th 1484, 1492 [“[A]n appellate court may decline to address the evidentiary support for any remaining jurisdictional findings once a single finding has been found to be supported by the evidence. [Citations.]”].)

The purpose of the dependency system “is to provide maximum safety and protection for children who are currently being physically, sexually, or emotionally abused, being neglected, or being exploited, and to ensure the safety, protection, and physical and emotional well-being of children who are at risk of that harm.” (§ 300.2.) Jurisdiction under section 300, subdivision (d) protects children from sexual abuse or the risk of sexual abuse.

The child’s description of the sexual abuse remained consistent throughout the case, whether she reported the abuse to Lydia, social workers, the forensic examiner, mother, or the juvenile court in her testimony. The juvenile court believed that the child was sexually abused. It also believed the child’s and other’s testimony that Diego entered the bathroom while the child was showering.

The child’s identification of Diego as her abuser was equally consistent throughout the case and there was no evidence that suggested any abuser other than Diego. Moreover, the period of abuse was extended, lasting approximately four years, and the child was 11 to 14 or 15 years old at the time. On these facts, there was no indication that the child was confused about the identity of her abuser. At the same time, the juvenile court found aspects of Diego’s testimony to be not credible. Yet the juvenile court did not believe the child when she identified Diego as her abuser. The juvenile court erred, the evidence before it compelled a finding that Diego was the child’s abuser as a matter of law.

IV. DISPOSITION

The order dismissing the section 300 petition as to the child is reversed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

KIM, J.

We concur:

BAKER, Acting P. J.

MOOR, J.